No. 9454.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

FRED WILLIAMS,

No. 30651-C Bankrupt.

WILLIAM I. HEFFRON, as Trustee of the Estate of FRED WILLIAMS, Bankrupt,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

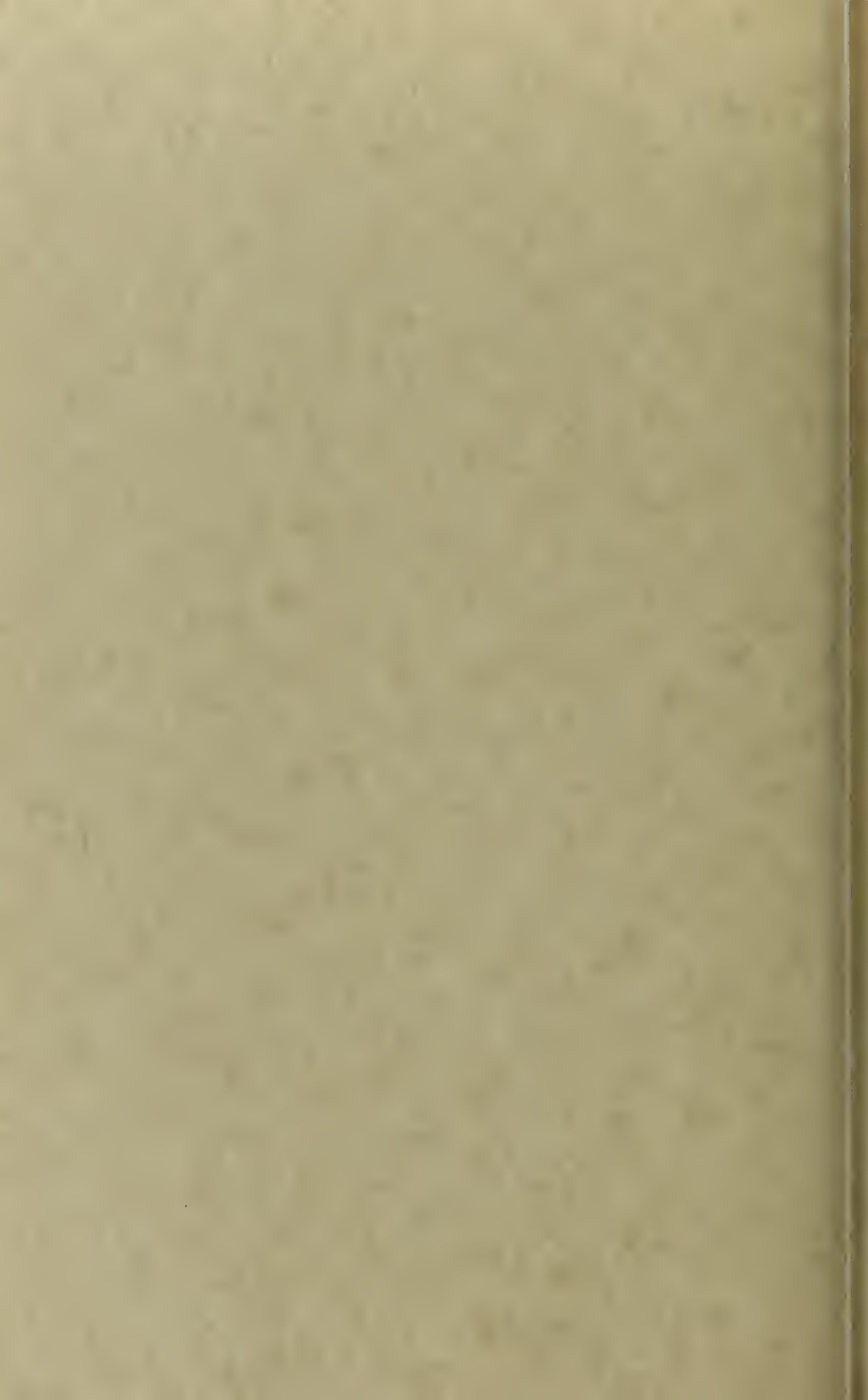
Appellee.

APPELLANT'S REPLY BRIEF.

RUSSELL B. SEYMOUR,
525 Citizens National Bank Building, Los Angeles,
Attorney for Appellant.

FILED
JUN 20 19[illegible]
PAUL P. O'BRIEN,
CLERK

Parker & Baird Company, Law Printers, Los Angeles.



TOPICAL INDEX.

PAGE

The record presents a reviewable question.. 1

Argument 6

I.

The District Court erred in holding that there was a valid change of possession.. 6

II.

The District Court erred in holding the transactions were in the ordinary course of trade in which the bankrupt was engaged, and usual practice and method of business of the bankrupt 7

All portions of the steel were stock in trade........................ 9

III.

The District Court erred in holding that the Uniform Warehouse Receipts Act Supersedes section 3440 as applied to the facts of this case.. 10

IV.

The District Court erred in finding that appellee took its pledge in good faith.. 11

V.

The pledged property was within the purview of section 3440 13

Reply brief of Lawrence Warehouse Company.................................. 17

Conclusion 17

TABLE OF AUTHORITIES CITED.

Cases.

PAGE

Boswell, In re, 96 Fed. (2d) 239, 36 A. B. R. (N. S.) 820........ 10

Gross v. Grossman, 5th Cir., 2 Fed. (2d) 458, 5 A. B. R. (N. S.), 51........ 12

McCaffey Canning Company, Inc. v. Bank of America, 109 Cal. App. 415 ....6, 10, 16

Moore v. Bay, 284 U. S. 4, 18 A. B. R. (N. S.) 675........ 12

Schainman v. Dean, 24 Fed. (2d) 475, 11 A. B. R. (N. S.) 593 ....7, 9, 11

Shelley v. Byers, 73 Cal. App. 44........9, 14

Union Trust Company v. Wilson, 198 U. S. 530........ 6

Rules.

Circuit Court Rules, Rule 20(d)........ 2

Circuit Court Rules, Rule 20 2-(d) 2

Circuit Court Rules, Rule 20(e)........ 2

Circuit Court Rules, Rule 75(d)........ 2

Statutes.

Civil Code, Sec. 953........ 13

Civil Code, Sec. 3440........7, 9, 10, 12, 13

Warehouse Act, Act No. 9059, General Laws, Sec. 39........ 13

Warehouse Act, Act No. 9059, General Laws, Sec. 42 ....13, 14

Warehouse Act, Act No. 9059, General Laws, Sec. 44........ 13

Warehouse Act, Act No. 9059, General Laws, Sec. 58........ 13

Warehouse Receipts Act, Sec. 42........ 10

Textbooks.

12 California Jurisprudence 972........ 11

Gilbert's Collier on Bankruptcy, 4th Edition, 1937........ 12

INDEX TO APPENDICES.

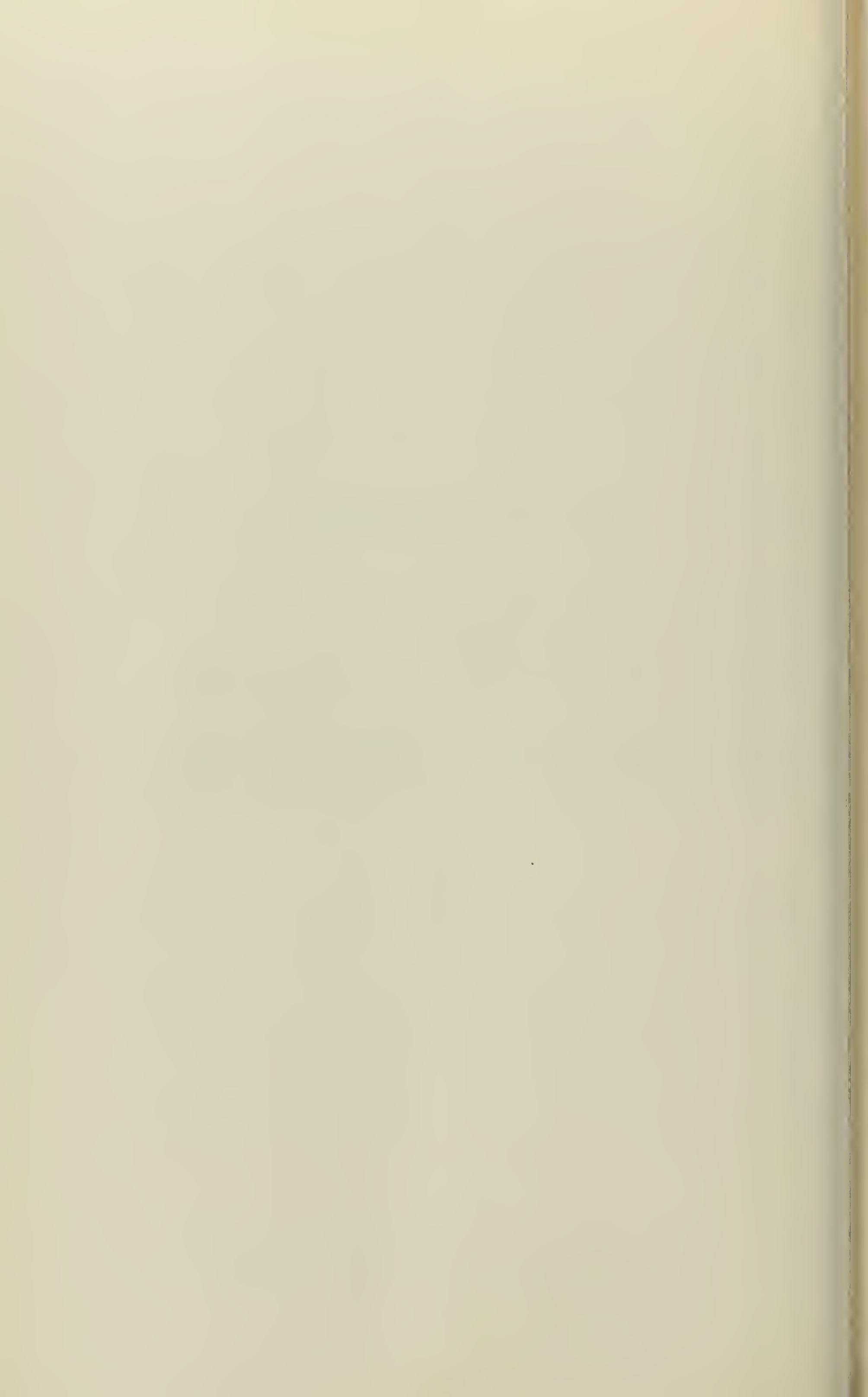
PAGE

Appendix A. Referee's findings re free steel 1

Appendix B. Shelley v. Byers, 73 Cal. App. 44 2

Appendix C. Moore v. Bay, 284 U. S. 4, 18 A. B. R. (N. S.) 675 4

Appendix D. Gilbert's Collier on Bankruptcy, 4th Edition, 1937, p. 1284 6



No. 9454.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

FRED WILLIAMS,

No. 30651-C Bankrupt.

WILLIAM I. HEFFRON, as Trustee of the Estate of FRED WILLIAMS, Bankrupt,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Appellee.

APPELLANT'S REPLY BRIEF.

The Record Presents a Reviewable Question.

Bank of America National Trust and Savings Association, appellee, in its brief (pp. 1-3), contends that no reviewable question has been presented and that the form of appellant's opening brief is insufficient. It may well be that the form could be improved upon, but let us consider the suggested improvements.

Rule 75(d) has been complied with, in our opinion. Not only has the entire record been included (with exceptions agreed to by appellee), but there has been served with the designation a concise statement of the points upon which the appellant intended to rely on the appeal [Tr. of R. pp. 537 to 548].

Counsel for appellant admits there has been failure to comply sufficiently with 2-(d) of Rule 20 of this Court in that there was not set out separately and particularly in the brief a specification of errors relied upon, for which counsel apologizes. Same was occasioned by the following matters. Counsel for appellant endeavored to comply with Rule 20(d) as same existed in the Copy of Rules of the Circuit Court furnished to counsel by a deputy clerk of the District Court of the United States, Southern District, about November, 1939, which Rules, it developed, did not include the amendment to Rule 20(d) of April 3, 1939, whereby cases of "bankruptcy" nature were removed from the exceptions contained in said Rule 20(d), and were excluded from the scope of Rule 20(e).

Within a day or two after the filing of appellant's brief, the undersigned counsel discussed the above omission with counsel of appellee, who advised the undersigned that no point would be made of the omission. Thereafter, and prior to the filing of appellee's brief, the undersigned discussed the omission with a deputy clerk of this court, in Los Angeles, who advised the undersigned that the omission could properly be cured by filing a short petition with the appellant's reply brief, setting forth the facts and

requesting permission to insert the omitted matter in the opening brief. The latter procedure, is therefore, being followed.

Furthermore, the specifications and points presented by appellant have been set forth as headings in the brief itself.

Appellee complains of failure by appellant to quote from the evidence.

There should be no dispute as to the facts themselves, but only as to deductions to be drawn from the admitted facts.

The referee made certain Findings of Fact [Tr. of R. pp. 85-103]. *All of these findings,* with exceptions to be noted, *were expressly confirmed* by order of the District Court [Tr. of R. pp. 157-162, especially at p. 158]. No appeal from, or other objection to, the order of the District Court has been made by the appellee, counsel for whom, incidentally, prepared the order. Nor does the appellant complain of the Findings of Fact by the referee which were confirmed by the District Court.

The Findings of Fact of the referee which were excepted by the order of the District Court are:

> "Each of the transactions above described, by the bankrupt with the claimant, was otherwise than in the ordinary course of trade of the bankrupt. Each of the transactions above described was otherwise than in the ordinary course of trade. Each of the said transactions was otherwise than in the regular and usual practice and method of business of the bankrupt"

for which was substituted

"Each of the transactions above described, by the bankrupt with the claimant, was not otherwise than in the ordinary course of trade of the bankrupt. Each of the transactions above described was not otherwise than in the ordinary course of trade. Each of the said transactions was not otherwise than in the regular and usual practice and method of business of the bankrupt."

and,

"There was no immediate delivery of any of the said steel to either the warehouse company or the claimant; and there was no actual and continued change of possession of said steel or any part thereof; that the possession maintained by the claimant now, and ever since the respective transactions has been, and is, only a sham and pretended possession; that the said warehouse receipts, and each of them, were received by the claimant as collateral for the purpose of avoiding the provisions of Section 3440 of the Civil Code of the State of California.",

for which was substituted,

"There was an immediate delivery of all of the steel to the claimant at the times of the several loans made by the claimant to the bankrupt by the delivery to the claimant of the warehouse receipts for the said steel. The possession maintained by the claimant now, and ever since the respective transactions has been, and is, not a sham and pretended possession, but

a real, actual, and bona fide possession. The Lawrence Warehouse Company at all times since the various deliveries of steel to it by the bankrupt maintained a real, actual, and bona fide possession of all of the said steel in full compliance of the provisions of the Warehouse Receipts Act of the State of California. The bank acted in good faith and was a bona fide holder for value of warehouse receipts issued by Lawrence Warehouse Company and steel described therein in each of said transactions. The said warehouse receipts, and each of them, were received by the claimant as collateral in compliance with and in pursuance to the Warehouse Receipts Act of California and the amendments thereto. (Statutes and Amendments, Cal. 1909, Chap. 290.)"

Such findings are, in the opinion of counsel, merely deductions to be made from the Findings of Fact which were confirmed.

The appellant has made as concise a statement of the case as is possible under the circumstances, and has set forth substantially the findings of the District Judge (appellant's brief, pp. 3 and 16).

In respect to the points upon which no separate, specific argument was made by appellant, it is appellant's position that any necessary argument was made in connection with preceding points and that repetition would not be proper or necessary.

ARGUMENT.

Appellant will endeavor to reply to argument of Bank of America National Trust and Savings Association, appellee, in the order that same is set forth in its brief. Any additional arguments of Lawrence Warehouse Company are set forth thereafter.

I.

The District Court Erred in Holding That There Was a Valid Change of Possession.

Counsel indicates that appellant (p. 29), has misstated facts in reference to separation of free goods. Appellant's version is shown in Appendix A, being a portion of Referee's Findings which were confirmed by order of the District Court, and to which no objection has been made by appellee.

Both appellee and Lawrence Warehouse Company rely strongly upon *Union Trust Company v. Wilson* (198 U. S. 530). It will be noted that therein the Supreme Court specifically points out that "no question under the statutes of Illinois is suggested." (p. 536).

At page 10 of its brief, appellee suggests that the fungible character of the goods will excuse an intermingling, as does Lawrence Warehouse Company at page 17 of its brief. Such might be the rule as between various depositors but we do not reconcile this rule with the holding of *McCaffey Canning Company, Inc. v. Bank of America,* 109 Cal. App. 415, at 435: "Whether warehousing is called 'field warehousing', or by any other name, it cannot be effectively conducted in this state without compliance with the law as declared in Section 3440 of the Civil Code."

Various cases cited by appellee (at page 11) apparently do not involve any statute such as Section 3440, which, we emphasize always, has been interpreted in the *McCaffey* case as determinative of the law of California insofar as warehousing transactions are concerned.

II.

The District Court Erred in Holding the Transactions Were in the Ordinary Course of Trade in Which the Bankrupt Was Engaged, and Usual Practice and Method of Business of the Bankrupt.

As indicated in our opening brief, we know of no cases, other than those cited, which discuss what is out of the "ordinary course of business" or the "regular and usual practice and method of business" of the vendor, transferor, or assignor. *The appellee has cited no cases at all.*

The referee found [Tr. of R. p. 99], and was confirmed by the District Court in his finding that "there was no custom of 'field-warehousing' by steel merchants or jobbers in order to finance their business."

That appellee insists (p. 14, appellee's brief), that other pledges, to-wit: California Bank and Prezant, established a practice by the bankrupt sufficient to remove the instant pledges from the effect of Section 3440. Such did not seem the case in view of the holding of the Ninth Circuit in *Schainman v. Dean,* 24 Fed. (2d) 475; 11 A. B. R. (N. S.) 593, at p. 596, where it is stated:

> "It is manifest from the testimony that the sales were not made in the ordinary course of trade and in the regular and usual practice and method of business of the vendor, and inasmuch as it appears that almost the entire stock in trade was sold at or about

> the same time, in the same manner, we think the court below was warranted in finding that the sale did involve a substantial part of the stock in trade, and came within the purview of the statute."

We would also point out that the finding of the referee [Tr. of R. p. 96] confirmed by the District Court, was that "one lot of steel had been pledged by means of warehouse receipts to one Prezant about August 1, 1937, but no such (stack) cards were maintained on or around said steel."

It is appellant's position that the finding of the District Court in connection with whether the transactions were "in the ordinary course of business" or the "regular and usual practice and method of business" is a finding semi-legal in nature and that it must be based upon findings which will support the conclusion arrived at. Therefore, we have cited no evidence because, in our opinion, the undisputed findings of the referee and of the District Judge require that a finding that the transactions are outside of "the ordinary course of business" or the "regular and usual practice and method of business" be made.

The testimony of the bankrupt, Mr. Vickery, and Ivan Bean all goes to the practice in the trade and as to what other steel dealers did. In spite of this testimony, or perhaps because of it, the referee and the District Court both found that there was no custom of "field warehousing" by steel merchants in order to finance their businesses [Tr. of R. p. 99].

Counsel for appellant, at page 16, says that the warehouse markings indicated that the property of the merchant is pledged and, therefore, presumably, creditors will not rely upon his stock of goods. However, the purpose of the Bulk Sales Provisions is to protect existing creditors. (*Schainman v. Dean, supra.*)

At page 17 counsel argues that the bankrupt's merchandise was not stock in trade. For lack of space we pass this with the suggestion that both the referee and the District Court found that the bankrupt was a retail and wholesale merchant and that the goods involved herein were a substantial portion of his stock in trade [Tr. of R. pp. 98 and 99].

All Portions of the Steel Were Stock in Trade.

At pages 19-21 appellant argues that portions of the steel were not stock in trade, primarily, it is asserted, because some of the steel was in a separate warehouse at 512 S. Anderson street, some of the steel was pledged to California Bank, and some of the steel had recently arrived at the warehouse.

We refer to the case of *Shelley v. Byers,* 73 Cal. App. 44 (65-67), where the entire stock in controversy was in the possession of third persons at the time the purported transfer was made. The court held the sale to be void under the Bulk Sales Provisions of Section 3440, in spite of the contention of the asserted purchaser that the property was not within the purview of the Bulk Sales Act because the property, at the time of the sale, was not in the possession or under the control of the sellers. A more extended statement of the court is set forth in Appendix B.

III.

The District Court Erred in Holding That the Uniform Warehouse Receipts Act Supersedes Section 3440 as Applied to the Facts of This Case.

No argument is made by the appellant that various courts, including the Supreme Court of the United States, have not held that the Uniform Warehouse Receipts Act is to be construed uniformly but it is our position that the courts of California have held that the Uniform Warehouse Receipts Act is to be administered in the State of California only when effect has been given to Section 3440 (we refer, of course, to the time prior to the enactment of Section 3440.5).

The "dire results" referred to at page 24 of appellant's brief are only the results which were set out in numerous California cases including the *McCaffcy* case and *Shelley v. Byers.*

Counsel for appellee refers glibly to *In re Boswell,* 96 Fed. (2d) 239, 36 A. B. R. (N. S.) 820, decided June 6, 1938. As we read the case, the only matter decided was that the Uniform Trust Receipts Act of California did not transgress the State Constitution in that it embraced more than one subject and that the subject was not expressed in the title.

At page 27 appellee contends that the Warehouse Receipts Act, particularly Section 42 thereof set forth by appellee, contains exclusive remedies for creditors. Such remedy seems to apply only between holders of receipts and creditors generally. The Bulk Sales Provisions of Section 3440 relate to creditors of specific persons, to-wit: retail and wholesale merchants, among others, and, according to the oft-cited *McCaffey* case, provisions of Section 3440 are controlling.

IV.

The District Court Erred in Finding That Appellee Took Its Pledge in Good Faith.

The argument of appellee extending from page 30 to page 55 seems to be that appellee was a holder in good faith; that the trustee in bankruptcy represents only "all" of the creditors; that the instant transaction is a constructive fraud; that under the laws of the State of California a representative of only "all" of the creditors may sue for constructive fraud; that some of the creditors herein were nonexisting creditors and therefore the trustee cannot recover. Appellee assumes that it is in good faith because merely there was no attack upon the consideration paid by it to the bankrupt and because there was no finding of insolvency or of bad faith. We refer to 12 Cal. Jur. 972 where it says:

> ". . . that a finding that there was an absence of fraudulent intent cannot neutralize the effect of a failure to record the statutory notice, for a conclusive presumption of fraud is incontrovertible."

Also, to 6 Cal. Jur. Supplement, pages 108-109, where is cited *Schainman v. Dean, supra.* In this respect, *Schainman v. Dean* says:

> "Section 70e of the Bankruptcy Act provides that the trustee may avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom transferred."

In the *Schainman* case it appears that a portion of the purchase price was paid to certain creditors of the bankrupt but this court held that this fact would constitute no defense.

In *Gross v. Grossman,* 5th Cir., 2 Fed. (2d) 458, 5 A. B. R. (N. S.), p. 51, a case arising under a Bulk Sales statute of Texas, the court said:

> "But Section 70e of the Bankruptcy Act authorizes the trustee in bankruptcy to avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and to recover property so transferred, unless the person to whom it was transferred was a bona fide holder for value. Under the Texas statute above cited, if there had not been an adjudication in bankruptcy, Minzer's creditors could have avoided the transfer to appellee and recovered the stock of goods. The appellee was not a bona fide purchaser, because he accepted the transfer prohibited by the State statute."

Appellee insists that it would be inequitable for later creditors to share in the proceeds of an action existing in favor only of existing creditors. This same matter was considered in *Moore v. Bay,* 284 U. S. 4, 18 A. B. R. (N. S.) 675, which case it set out in full in Appendix C. This case involved the Bulk Sales Section of Section 3440 and arose from the 9th Circuit. The holding was against the contention of the appellee herein, the Supreme Court's opinion being, in effect, that if the trustee represented but even one of several creditors, it was sufficient, and the trustee was entitled to recover for the benefit of all creditors of the estate, whether existing or otherwise.

The foregoing statements of the appellant are supported by statements in Gilbert's Collier on Bankruptcy, 4th Edition, 1937, same being shown in Appendix D.

V.

The Pledged Property Was Within the Purview of Section 3440.

At page 56 appellee contends that because warehouse receipts were pledged same is outside the scope of Section 3440 in that they are choses in action.

Section 953 of the Civil Code reads: "A thing in action is a right to recover money or other personal property by judicial proceeding."

Certain sections of the Warehouse Act, Act No. 9059, General Laws, read as follows:

> Section 39: "A receipt which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee. A non-negotiable receipt cannot be negotiated, and the endorsement of such a receipt gives the transferee no additional right."
>
> Section 42: "A person to whom a receipt has been transferred but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor. . . ."
>
> Section 44: "A person who for value negotiates or transfers a receipt by indorsement or delivery . . . warrants—
>
> (b) That he has a legal right to negotiate or transfer it.
>
> (d) That he has a right to transfer the title to the goods . . ."
>
> Section 58: ". . . To purchase includes to take as a mortgagee or as pledgee. 'Purchaser' includes mortgagee and pledgee."

Eliminating, for the purpose of this discussion, any question of failure of change of possession, etc., we find, in the instant case, and using the loan of August 5, 1937, as an illustration, the goods in the Lawrence Warehouse on August 3rd. Receipts are issued on that day. Possession is in Lawrence. Williams has title and the further right to take possession of the goods upon performance of his contract with Lawrence, being the payment of any accrued charges. On August 5th, Williams transfers the receipts to the claimant at which time the claimant takes the title of Williams to the goods subject to its pledge agreement with Williams and subject to payment of warehouse charges. Section 42 above.

In the case of *Shelley v. Byers, supra,* the Shelley boys were the owners of a department store in San Diego, and on February 4, 1922, the business was adjudged bankrupt. While the property was in possession of the bankruptcy court, the Shelley boys pledged the goods to Collober and Rosenberg, who furnished the consideration for a composition offer by the Shelley boys. When the composition was completed, the goods were turned over by the bankruptcy court to Collober and Rosenberg who were to hold the goods until the Shelley boys should comply with their agreement with Collober and Rosenberg by payment of certain moneys. A seven-day notice was given. While the goods were still in possession of Collober and Rosenberg, the Shelley boys sold the stock to their father. No seven-day notice was recorded. A creditor of the Shelley boys, apparently unaffected by the composition, levied an

attachment on the theory that there had been no compliance with the Bulk Sale Act.

The father contended that the sale to him by the boys was not within the purview of the Bulk Sale Act because the property, at the time of the sale to him, was not in the possession or under the control of the boys. The ruling of the court was against the father, and a portion thereof is set out in Appendix B.

Compare now the relative positions of the parties, the goods, and the title, from the viewpoint of the "chose in action" theory. In the instant case, on August 5th, just prior to transfer of the receipts by Williams to the claimant, Williams had title and the right to take possession from Lawrence upon payment of required warehouse charges. In the *Shelley* case, just prior to the sale to the father, the Shelley boys had title and the right to take possession from Collober and Rosenberg upon fulfilling the terms of the pledge agreement. By delivering the receipts to the claimant, Williams transferred his title and right to take possession of the goods (section 42 above). By oral assignment to the father, the Shelley boys transferred their title and right to take possession from Collober and Rosenberg.

If the one was a "chose in action" transaction; so was the other.

The important thing to consider is that the Bulk Sale Law is intended to protect existing creditors from any secret transfers of *title* (as security or otherwise) to the stock in trade. It is apparent that the pledging of the

receipts was only a method whereby Williams' title was pledged; just as in the *Shelley* case, where the Shelley boys' title was assigned.

To give weight to contention of the claimant, it would be necessary to construe the pertinent parts of the Bulk Sale provision as follows: ". . . that the transfer . . . (*other than by means of a chose in action*) . . . of a stock in trade. . . ."

If the purposes of the lender and of the merchant be legitimate, no harm can come from the slight delay involved by the seven-day notice; if the purposes are otherwise, or if it be feared that the attention of existing creditors would be called to the transactions, then the loan should not be made.

As was said in the *McCaffey* case, *supra:*

> "Instead of actual possession the bank claims to have obtained symbolical possession by virtue of the warehouse receipts; but these receipts can have no virtue, unless the warehouse company had the same actual and exclusive possession and dominion which would have been essential to the protection of the bank, if it had acted independently in reliance on the goods instead of on the receipts"

could easily be applied to the present case by saying:

> "The bank claims to have received choses in action in pledge, but such choses in action can have no virtue, unless they were created or delivered as collateral in the same manner as would have been necessary had the goods represented by such choses in action been delivered as a pledge."

Reply to Brief of Lawrence Warehouse Company.

The court will note that Lawrence Warehouse Company has been named an appellee. Such was done through an overabundance of precaution on the part of the appellant; in view of the fact that probably the Lawrence Warehouse Company was not a party to the proceeding, merely *amicus curiae* in the District Court. The appellant enters no objections, however, to its appearance in this matter.

We believe that substantially all the points raised by Lawrence Warehouse Company have been discussed by the appellant in this brief or appellant's opening brief.

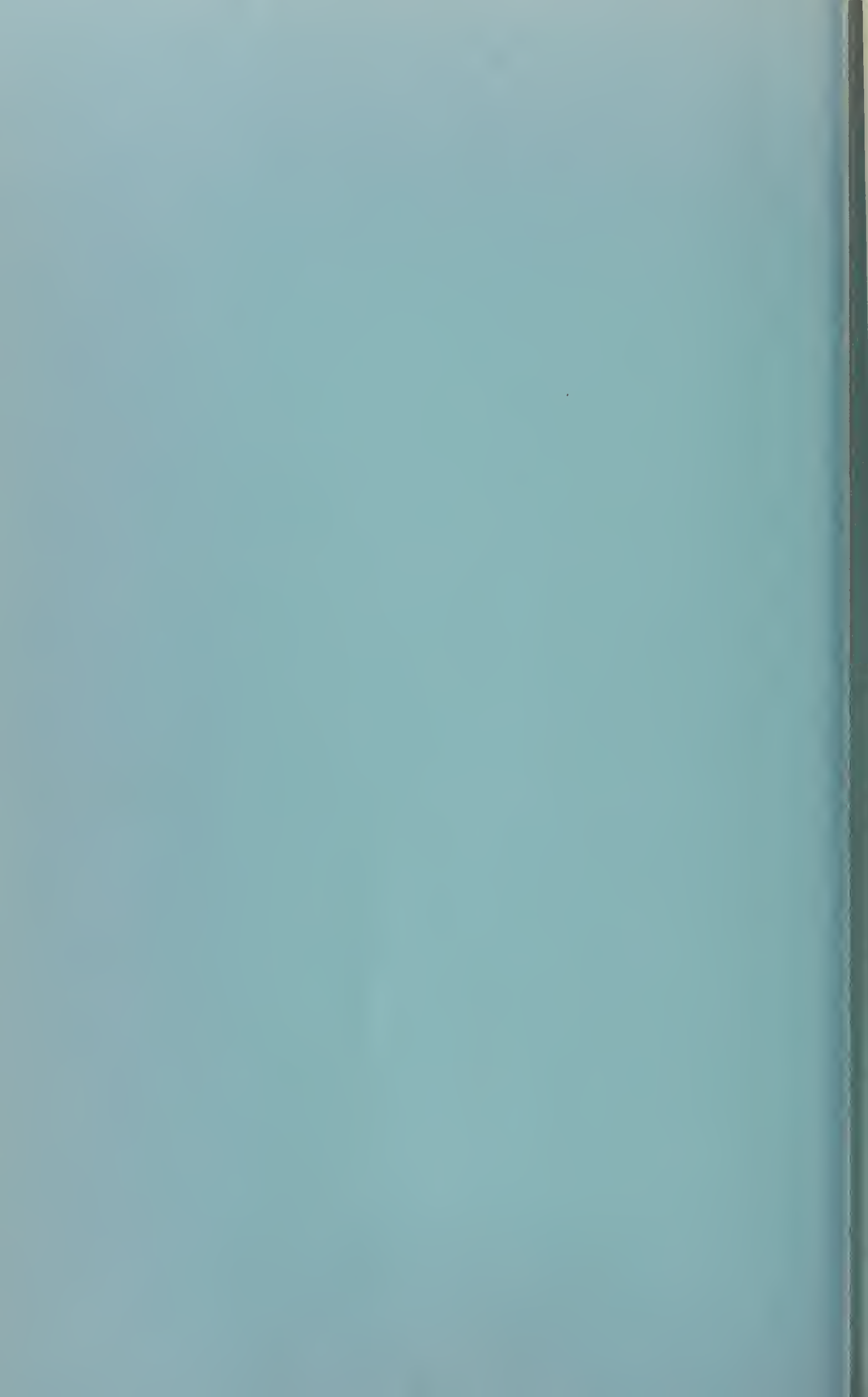
Conclusion.

In conclusion, therefore, appellant submits that the transactions involved are within the scope of Section 3440; that there has been a violation of that section in two respects, to-wit: The Change of Possession and Bulk Sales portions thereof; that the trustee is possessed with sufficient rights to maintain his objections; that the order and findings of the referee were correct.

Respectfully submitted,

Russell B. Seymour,

Attorney for Appellant.



APPENDICES.

Appendix A.

REFEREE'S FINDINGS RE FREE STEEL [Tr. of R. 96-97].

There was considerable steel that was not included in any receipts, being the unincumbered property of the bankrupt and classed as "free" steel. This free steel was kept in the same piles or bins or shelves as the steel covered by the receipts, with stack cards at the end or top of the piles or bins or shelves. A small band of wire in *some instances* was wrapped around some of the free goods but there were no marks of any kind on these bands or wires excepting that some of them were painted white. *In many instances* the free steel was commingled with the steel covered by the receipts in that the free steel was not physically separated from the pledged steel. One lot of steel had been pledged by means of warehouse receipts to one Prezant about August 1, 1937, but no such cards were maintained on or around said steel.

The Warehouse Company took or kept no inventory or account of any of the goods within the premises at 663 So. Anderson street excepting such goods as were covered in the warehouse receipts issued as hereinabove set forth. At all times, the bankrupt was permitted to and did engage freely in the sale of "free goods" located upon the premises and there was no requirement of the bankrupt to obtain permission of any kind from the Warehouse Company before making shipments from the premises of any steel not covered in the receipts. Such shipments were handled by Rinne or the bankrupt or both.

Appendix B.

Shelley v. Byers, 73 Cal. App. 44 (65 to 67).

We are unable to agree with this contention. Section 3440, which declares that transactions are deemed to be constructively fraudulent, deals with two major classes of conveyances. The first class includes those transfers of personal property which are conclusively presumed to be fraudulent because not "accompanied by an immediate delivery and followed by actual and continued change of possession." As to such transfers the statute expressly declares that the presumption of fraud attached "if" the transfer is "made by a person having at the time the possession or control of the property." This language implies, as a necessary corollary, the proposition that the transfers dealt with in the first part of the section are not presumptively fraudulent or void if made by persons not having at the time the possession or control of the property. The second major class of transfers which the section declares to be constructively fraudulent are sales and transfers of "a stock in bulk."

It is the latter class of transfers which is covered by what is commonly known as the Bulk Sales Law, adopted in 1903 when the legislature amended Section 3440 by adding the provisions relative to the sale of "stock in trade in bulk". Unlike the restrictions found in the first part of the section, those added in 1903 do not exempt from their operations bulk sales of stock in trade of which the vendor has not the possession or control. That is to say, the language of the Bulk Sales Law is broad

enough to include every sale, transfer or assignment of stock in trade in bulk, regardless of whether the vendor has or has not the possession or control of the property. An interpretation which would read into this part of the section a provision that every sale in bulk made without the requisite statutory notice is nevertheless valid as against existing creditors if the vendor, transferor, or assignor has not at the time the actual possession or control of the stock in trade, regardless of what the other circumstances might be, not only would overturn the Bulk Sales Law as it is written but would leave creditors helpless; for in the main such creditors could not protect themselves against an arrangement which although secret was lawful. No one could safely give credit on the faith of the debtor's title to his property, however valuable that title might be; as, for example, where the value of the pledgor's merchandise exceeds the amount of the debt secured by the pledgor. A door to fraud would be opened and many would enter, to the injury of credit and the confusion of business. . . . (at 67). In view of the circumstances above narrated, the purpose of the Bulk Sales Law to protect existing creditors would be entirely frustrated if it should receive an interpretation that would uphold the Shelley boys' transfer to their father of *their title to this stock in trade* in the absence of any recorded notice thereof.

Appendix C.

Moore v. Bay, 284 U. S. 4, 18 A. B. R. (N. S.) 675.

The bankrupt executed a mortgage of automobiles, furniture, show room and shop equipment that is admitted to be bad as against creditors who were such at the date of the mortgage and those who became such between the date of the mortgage and that on which it was recorded, there having been a failure to observe the requirements of the Civil Code of California, Section 3440. The question raised is whether the mortgage is void also as against those who gave the bankrupt credit at a later date, after the mortgage was on record. The Circuit Court of Appeals affirmed an order of the District Judge giving the mortgage priority over the last creditors. Whether the Court was right must be decided by the Bankruptcy Act since it is superior to all state laws upon the subject. *Globe Bank & Trust Co. v. Martin,* 236 U. S. 288, 34 Am. B. R. 162, 35 S. Ct. 377, 59 L. Ed. 583.

The trustee in bankruptcy gets the title to all property which has been transferred by the bankrupt in fraud of creditors or which prior to the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him. Act of July 1, 1898, 30 Stat. at L. 565, chap. 541, Section 70, U. S. C. title 11, Section 110. By Section 67, U. S. C. title 11, Section 107 (a), claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate. The rights of the trustee

by subrogation are to be enforced for the benefit of the estate. The Circuit Courts of Appeal seem generally to agree, as the language of the Bankruptcy Act appears to us to imply very plainly, that what thus is recovered for the benefit of the estate is to be distributed in "dividends of an equal per centum on all allowed claims, except such as have priority or are secured." Bankruptcy Act, Section 65, U. S. C. title 11, Section 105. *In re Kohler* (C. C. A., 6th Cir.), 20 Am. B. R. 89, 87 C. C. A. 51, 159 F. 871; *Mullen v. Warner* (C. C. A., 4th Cir.), 7 Am. B. R. (N. S.) 93, 11 F. (2d) 62; *Campbell v. Dalbey* (C. C. A., 5th Cir.), 11 Am. B. R. (N. S.) 336, 23 F. (2d) 229; *Cohen v. Schultz* (C. C. A., 3d Cir.), 16 Am. B. R. (N. S.) 563, 43 F. (2d) 340; *Globe Bank & Trust Co. v. Martin,* 236 U. S. 288, 34 Am. B. R. 162, 35 S. Ct. 377, 59 L. Ed. 583.

Appendix D.

Gilbert's Collier on Bankruptcy, 4th Edition, 1937.

(Page 1284) It is the corollary of Section 67-b, and means simply that if a creditor could have avoided any transfer (not merely a lien) under the laws of the State, the trustee can do the same, although made more than four months prior to the adjudication of bankruptcy, and irrespective of the financial condition of the bankrupt at the time it was made. The trustee holds the rights of the bankrupt itself under the laws of the particular State, at the time of filing of the bankruptcy proceedings, and also the rights of a lien creditor as of the same time, and may choose either title. Intent to defraud a creditor is an essential element of the action and must be established, and it must appear that the conveyance was received, either without consideration or with knowledge of the fraudulent intent. The question whether a particular transfer is fraudulent under Section 70-e must be determined by the laws of the State which govern the transfer in question.

(Page 1289) Sales of goods in bulk otherwise than in the ordinary course of trade, are made presumptively fraudulent and void under the statutes of many States unless certain provisions such as notice have been adhered to; and the title to such property passes to the trustee in bankruptcy free from such void transfer. (Page 1291) The purchaser of a stock of goods in bulk where the Bulk Sales Act has not been complied with is

not a *"bona fide* holder for value prior to adjudication" within the meaning of subdivision.

(Page 1292) A suit may be maintained by the trustee under this subdivision, although neither the trustee nor any creditor has reduced the claim against the bankrupt to a judgment, issued execution and had it returned unsatisfied. This is by reason of the fact that under Section 47-a of the Bankruptcy Act, the filing of a petition in bankruptcy confers upon the trustee the same rights as a judgment creditor holding an execution duly returned unsatisfied. To hold that a trustee cannot attack a fraudulent conveyance made by the bankrupt more than four months before the filing of the petition, without showing that some creditor had obtained a judgment and issued execution thereon, so that he could maintain a similar action, would be simply to assist a dishonest debtor in disposing of his property. To sustain an action by a trustee in bankruptcy to avoid a fraudulent transfer under this section, it must be shown that at least one of the present creditors or his successor in interest was a creditor when the transfer was made.